NO. 41876-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN M. TROIT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Wm. Thomas McPhee, Judge
Cause No. 10-1-01724-4

BRIEF OF APPELLANT

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02. The trial court erred in not taking the case from the jury for lack of sufficiency of the evidence that Troit possessed methamphetamine with intent to deliver.

03. The trial court erred in imposing a jury demand fee of $901.

04. The trial court erred in permitting Troit to be represented by counsel who provided ineffective assistance by failing to object to the imposition of a jury demand fee of $901 following Troit's conviction.

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03. Whether the trial court exceeded its statutory authority by imposing a jury demand fee in the amount of $901? [Assignment of Error No. 3].

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04. Whether the trial court erred in permitting Troit to be represented by counsel who provided ineffective assistance by failing to object to the imposition of a jury demand fee of $901 following Troit's conviction? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

John M. Troit (Troit) was charged by information filed in Thurston County Superior Court on November 16, 2010, with unlawful possession of methamphetamine with intent to deliver, contrary to RCW 69.50.401(2)(b). [CP 5; RP 9].[1]

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8]. Trial to a jury commenced on January 24, the Honorable Wm. Thomas McPhee presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 97].

The jury returned a verdict of guilty as charged, Troit was sentenced within his standard range and timely notice of this appeal followed. [CP 31, 34-44].

02. Substantive Facts

Just after midnight on November 10, 2010, Troit was arrested and taken into custody on outstanding felony and

[1] Unless otherwise indicated, all references to the Report of Proceedings are to the transcript entitled VERBATIM REPORT OF PROCEEDINGS – Volume I.

misdemeanor warrants and for obstructing justice. [RP 54-55]. A search of Troit incident to his arrest produced, in part, several empty small baggies, one sandwich bag and multiple one- and two-inch smaller bags, all containing a similar white powder-like substance of suspected methamphetamine, with an estimated street value of $4,500. [RP 54-56, 62-63]. The contents in the sandwich bag (36.4 grams) and one smaller bag (3.5 grams) were analyzed as representative samples and tested positive for methamphetamine. [RP 85-86, 91]. An address book and a list of vehicles with license numbers were also seized. [RP 63, 68].

Troit rested without presenting evidence. [RP 93].

D. ARGUMENT

01. TROIT'S COUNSEL WAS INEFFECTIVE IN FAILING TO INFORM HIM PRIOR TO TRIAL THAT THE STATE HAD TENDERED A PLEA AGREEMENT TO A LESSER OFFENSE WITH LESS PUNISHMENT.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early,

70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of error initiated by the defendant, State v. Henderson, 114 Wn.2d at 870, the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Near the end of Troit's arraignment on November 20, 2010, the following record was made:

> (Prosecutor): Your Honor, for the record, I've already handed defense counsel a copy of the state's offer, statement of criminal history and offender score worksheet.
>
> (Defense): I have them.

[RP 11/30/10 3].

At sentencing, in asking "for a hundred months(,)" the prosecutor underscored that Troit "was given an opportunity prior to this for a - - prior to the trial to have a different outcome. He chose not to. He chose

to take it to trial." [RP 03/03/11 6]. In response, defense counsel explained that the reason Troit "went to trial was is (sic) that what was found on him was his. He had no intent of selling to anyone else. He had no intent of doing anything but using it himself." [RP 03/03/11 12].

Troit, in explaining why he went to trial, informed the court:

> There was a plea offer given to me the first time I got a visit from my attorney, Mr. Jimerson. I held off on that. And then the day before trial he comes in, it was the next time I seen him, and I said, "What's up with the deal?" And he said that it was a mistake, and the only question was whether or not to give the jury an option at a lesser charge or not, and he was salivating at the opportunity to go all the way. So that's why I went to trial.

[RP 03/03/11 14-15].

The following then occurred:

> (Defense): I want to clarify and not contradict what he (Troit) said. The original offer was to plea as charged, but to accept a sentence within a range for simple possession, and so the offer, as I understood it, was to plea as charged, but the amount of time was not what - - compatible with what he would have done, and that's what I told Mr. Troit.
>
> (The Court): All right.
>
> (Prosecutor): And Your Honor, if I can clarify that, Mr. Jimerson came to me and said specifically, if I understand it right, your offering him possession with a 12-plus to 24-month month sentence instead of delivery, and I said yes, that is correct. So we had a very distinct discussion about the offer to being possession, not to delivery.
>
> (The Court): All right. Thank you.

(Troit): I didn't know that.

[RP 03/03/11 17].

Defense counsel is ethically obligated to discuss plea negotiations with his or her client in order to provide the client with sufficient information to make an informed decision on whether to accept a plea bargain or go to trial. Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S. Ct. 316, 92 L. Ed. 2d 309 (1948); In re Personal Restraint of McCready, 100 Wn. App. 259, 263-64, 996 P.2d 658 (2000) (counsel's failure to advise client of mandatory minimum sentence for first degree assault with a firearm before rejection of plea bargain and ensuing trial required reversal, since decision to reject plea offer was uninformed).

Here, defense counsel[2] was provided with a copy of the State's plea bargain at Troit's initial arraignment on November 20, 2010, two-plus months prior to trial. According to the State, sometime during this period defense counsel met with the prosecutor and confirmed that the offer was "possession with a 12-plus to 24-month sentence instead of delivery(,)" which, according to Troit and defense counsel, was never relayed to Troit [RP 03/03/11 17]. At sentencing, defense counsel represented he had advised Troit that the deal was to "plea as charged, but to accept a

[2] Troit was represented at his arraignment by Mr. Hansen, who informed the court that "Mr. Jimerson of my office will be assigned to represent Mr. Troit." [RP 11/30/2010 3].

sentence within a range for simple possession [RP 03/03/11 17](,)" which is an exceptional sentence,[3] the slightest evidence of which exists nowhere in the record. Nor was anything presented to suggest that Troit was ever advised of the difficulty in obtaining an exceptional sentence downward, which, on the most basic level, would be expected given that a judge is not bound by anyone's recommendation as to sentence and must impose a sentence within the standard range unless it finds substantial and compelling reasons not to do so. CrR 4.2. The State's version of the plea bargain stands in stark contrast to defense counsel's and to what Troit asserted was his counsel's representation to him. But by all accounts, Troit was not provided with accurate information before deciding to reject the plea offer and go to trial.

Defense counsel's failure to advise Troit of his available options constituted deficient performance, for Troit, based on the record in this case, could not have made an informed decision to reject the plea offer he "didn't know" even existed. Nothing else can be made of it. Knowing of the plea bargain offered by the State, and given the disparity between the sentencing ranges of possession with intent (60+ to 120 months) and mere possession (12+ to 24 months), and factoring in the difficulty in getting an

[3] Based on Troit's offender score of 8, his standard range for possession with intent to deliver methamphetamine was 60+ to 120 months. RCW 9.94A.517; RCW 9.94A.518; RCW 9.94A.525(13). His standard range for possession of methamphetamine was 12+ to 24 months. RCW 9.94A.517; RCW 9.94A.518; RCW 9.94A.517.

exceptional sentence downward, Troit may have made a different choice, deciding instead to opt for the plea bargain and forgo the risk of getting an acquittal.

This court should remand to give Troit the opportunity to pursue plea negotiations on the original offer in an informed manner, thus putting him in the position he was before he was incorrectly informed of the State's plea bargain. See Nunes v. Mueller, 350 F.3d 1045, 1049-50, 1054-55, 1057 (9th Cir. 2003), Cert. denied, 125 S. Ct. 808 (2004) (petitioner ordered released unless offered same material terms in original plea offer following reversal of conviction based on uninformed guilty plea resulting from ineffective assistance); see also In re Personal Restraint of McCready, 100 Wn. App. at 265 (conviction reversed and remanded for new trial following misinformed consequences of rejecting plea offer).

Counsel for Troit, it bears repeating, misrepresented the plea offer, with the result that Troit's conviction for unlawful possession of methamphetamine with intent to deliver should be reversed and the case remanded for the State to renew its plea offer.

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02. THERE WAS INSUFFICIENT EVIDENCE THAT TROIT POSSESSED METHAMPHETAMINE WITH INTENT TO DELIVER.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

In closing, the State summarized the essence of the evidence of intent to deliver as (1) the amount of 56 grams, (2) the potential resale value of $4,500, (3) the address book, (4) the list of vehicles with license numbers and (5) the multiple baggies found on Troit at the time of his arrest. [RP 122-26].

This evidence, however, is insufficient to establish an intent to deliver or to differentiate an intent to possess from an intent to deliver. Bare possession is not enough to support an inference of intent to deliver. Evidence of an additional factor is required and this corroborating evidence must be substantial. State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993) (officer's opinion that cocaine in defendant's possession exceeded amount commonly possessed for personal use insufficient to support inference of intent to deliver); see also State v. Campos, 100 Wn. App. 218, 998 P.2d 893 (2000) (sufficient evidence of intent to deliver where defendant arrested with undiluted cocaine, $1,750 in small denominations, pager, cell phone and a list with a column of numbers and Spanish word for "snow")

Much of the usual evidence of intent to deliver was not produced: no specific contact information, no weapon, no scales or other drug paraphernalia indicative of sales or delivery, nothing to indicate the area where Troit was arrested was often used for drug transactions and no large amount of cash. The evidence was fatally short of the inventory of a merchant, with the result that Troit's conviction for possession with intent to deliver methamphetamine must be reversed and dismissed.

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03. THE TRIAL COURT ERRED IN IMPOSING A JURY DEMAND FEE OF $901.

At sentencing, the court ordered Troit to pay a "Jury demand fee" of $901. [RP 03/03/11 20; CP 47].

While there is a question as to whether this issue properly before this court in this appeal as a matter of right, see State v. Smits, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009), Troit respectfully asks this court to exercise its discretion and consider the merits of this argument under RAP 1.2(c), as it recently did in addressing a similar issue in State v. Hathaway, 161 Wn. App. 634, 251 P.3d 253 (2011).

RCW 10.01.160(1) permits the trial court to impose costs following a defendant's conviction. "They cannot include expenses inherent in providing a constitutionally guaranteed jury trial...." Id. And while a court is authorized to impose a jury demand fee of up to $125 for a six-person jury or $250 for a 12-person jury, RCW 36.18.016(3)(b), the trial court erred here when it imposed a jury demand fee of $901, which is in excess of its statutory authority. Accordingly, the case should be remanded to the trial court to impose fees in accordance with the jury's size.

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04. TROIT WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE IMPOSITION OF A JURY DEMAND FEE OF $901 FOLLOWING HIS CONVICTION.

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the imposition of a jury demand fee of $901, then both elements of ineffective assistance of counsel have been established.[4]

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly make the objection for the reasons set forth in the preceding section.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly objected, the trial court would not have imposed the jury demand fee of $901 following Troit's conviction.

E. CONCLUSION

Based on the above, Troit respectfully requests this court to reverse and/or dismiss his conviction or remand for resentencing consistent with the arguments presented herein.

DATED this 25th day of September 2011.

Thomas E. Doyle
THOMAS E. DOYLE, WSBA 10634
Attorney for Appellant

[4] For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne	John M. Troit #957824
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DATED this 25th day of September 2011.

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DOYLE LAW OFFICE

September 25, 2011 - 3:19 PM

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